Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

J. MICHAEL QUINLAN AND LOYE W. MILLER, JR.,
Petitioners,

v.

BRETT C. KIMBERLIN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL L. MARTINEZ
Counsel of Record
PAUL G. LANE
THOMPSON HINE & FLORY LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800
Counsel for Petitioners

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QUESTIONS PRESENTED

1. Whether, in a *Bivens* case alleging improper motive, defendants are precluded from obtaining qualified immunity where their conduct was objectively reasonable and plaintiff has failed to identify any affirmative evidence of improper motive.

2. Whether, to advance the goal of resolving immunity issues promptly, the Court of Appeals must determine entitlement to immunity where the district court has failed to do so.

3. Whether the Court of Appeals may preclude in advance any future interlocutory appeal, thereby, in effect, "assuring compliance below while avoiding accountability above."

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in this case were as follows:

Respondent Brett C. Kimberlin is the plaintiff;

Petitioners J. Michael Quinlan and Loye W. Miller, Jr. are defendants;

The United States of America, was a defendant.

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PETITION FOR WRIT OF CERTIORARI

Petitioners J. Michael Quinlan and Loye W. Miller, Jr. respectfully petition for a writ of certiorari to review the judgment and opinion in this case of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 199 F.3d 496 (D.C. Cir. 1999) and is reprinted in the Appendix ("App.") at 1a-20a. That Court's Order denying rehearing and rehearing *en banc* is reported at 207 F.3d 667 (D.C. Cir. 2000) and reprinted at 21a-24a. The Memorandum Opinion of the

United States District Court for the District of Columbia is unreported. It is reprinted at 25a-42a.[1]

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its initial opinion on December 28, 1999. Petitioners filed a timely petition for rehearing with suggestion for rehearing *en banc*. The Court of Appeals denied both the petition for rehearing and the suggestion for rehearing *en banc* on April 4, 2000. App. at 21a-24a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Factual Background

Just prior to the November 8, 1988 presidential election, Brett C. Kimberlin, then an inmate incarcerated at the Federal Correctional Institute ("FCI") in El Reno, Oklahoma, tried to

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[1] This Court previously granted certiorari and held oral argument in this case as No. 93-2068. The Court's resolution — remanding the case for further proceedings in light of *Johnson v. Jones*, 515 U.S. 304 (1995) — is reported at 515 U.S. 1129 (1995). Prior reported decisions of the Court of Appeals are reported at 6 F.3d 789 (D.C. Cir. 1993) and 17 F.3d 1525 (D.C. Cir. 1994). A prior reported decision of the District Court is reported at 774 F. Supp. 1 (D.D.C. 1991).

interest various members of the media in his contention that in 1972 he sold marijuana to Dan Quayle, the 1988 Republican candidate for vice-president.[2] Initially, Kimberlin's media contacts took no interest in the story. Then, on November 4, 1988, NBC News taped an interview with Kimberlin at FCI-El Reno. The interview—conducted only four days before the election—occurred with the personal intervention of petitioner J. Michael Quinlan, then Director of the Federal Bureau of Prisons ("BOP").

NBC News did not air the interview. The fact it occurred, however, generated numerous media requests the same day to interview Kimberlin about his Quayle allegations. In response, the Acting-Warden at FCI-El Reno scheduled a press conference for 7:00 p.m. that evening. James Jones, the BOP's press officer in Washington, D.C., began receiving numerous inquiries about the press conference and concluded that it was becoming a "three ring circus." Jones informed Quinlan, who instructed that the "press conference" be canceled because, as he explained, BOP policy does not authorize inmate press conferences and, as Director, he had not permitted them. He was also concerned about the effect on prison security of a Kimberlin press conference.

The cancellation of the press conference did not prevent Kimberlin from contacting the press. Shortly after it was canceled, Kimberlin separately telephoned two reporters, Cody Shearer and Nina Totenberg. After complaining about the cancellation to Shearer, Kimberlin said, the press "can

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[2] Kimberlin is serving a 51-year sentence for a variety of misdeeds, including unlawfully manufacturing a destructive device and malicious damage by means of explosives. He was released on parole in 1994. In 1997, his parole was revoked for ongoing fraudulent activities. He is currently incarcerated at the FCI in Petersburg, Virginia. For a complete exposition of Kimberlin's criminal history, *see Kimberlin v. Dewalt*, 12 F. Supp. 2d 487, 489-94 (D. Md.), *aff'd sub nom., Kimberlin v. Bidwell*, 166 F.3d 333 (4th Cir. 1998), *cert. denied*, 527 U.S. 1041 (1999).

protect me better than I can," and "this is really scary." Kimberlin also telephoned Totenberg at home and, in wondering why the press conference had been canceled said, "Well, I don't know what's going on. It's got me a little nervous obviously." Totenberg subsequently testified she "was concerned about what the Justice Department might do to [Kimberlin]."

Following her conversation with Kimberlin, Totenberg telephoned petitioner Loye W. Miller, Jr., then-Director of Public Affairs for the Department of Justice, and expressed to him that Kimberlin was afraid of what prison officials might do to him. She also telephoned Mark Goodin of the Bush/Quayle campaign and related to him Kimberlin's fears for his safety. Miller telephoned Jones and advised Jones of Totenberg's statement that Kimberlin was "afraid." Either Jones or Thomas Kane, Quinlan's Assistant, then advised Quinlan by telephone of Kimberlin's fear.

Based on being advised of Kimberlin's fear, Quinlan telephoned BOP Regional Administrator J.D. Williams and instructed that Kimberlin be placed in administrative detention, a non-punitive status, pending an investigation into threats to his safety. Quinlan also instructed Williams to ensure that Kimberlin be permitted access to a telephone. Williams, in turn, instructed FCI-El Reno officials to place Kimberlin in administrative detention. Quinlan testified that he, and he alone, made the detention decision, that he never spoke to Miller or to any Bush/Quayle official about the decision, and that he never inquired about the content of what Kimberlin would say. Kimberlin was then placed in administrative detention in a cell with one other person and given access to a telephone. While in administrative detention, Kimberlin telephoned Totenberg and made at least six additional calls.

Kimberlin's fears were promptly investigated and, when it was determined there was no danger, he was released back to

the general population of FCI-El Reno the next day, November 5, 1988, about twenty hours after he had been placed in detention. On the following day, November 6, 1988, two days before the election, Kimberlin had full access to the media and was interviewed on a number of talk radio and news shows. Kimberlin was subsequently placed in detention on two other occasions for violating telephone regulations. Quinlan and Miller had no involvement in either action.

B. Procedural History

In 1990, Kimberlin filed this *Bivens*[3] action asserting constitutional claims against Quinlan and Miller, and various other claims against the United States. Following one trip through this Court, full discovery was conducted, followed by a summary judgment motion in which Quinlan and Miller asserted their entitlement to qualified immunity.[4] The district Court (Hon. Harold H. Greene), dismissed all claims against the United States, but denied qualified immunity on Kimberlin's sole remaining claim against Quinlan and Miller —that they acted with an improper First Amendment motive in canceling Kimberlin's press conference and having him placed in detention. App. at 41a-42a. In doing so, the district court ignored Quinlan's and Miller's immunity arguments that were based on the fully developed record, and held that the clearly established law component of the

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[3] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[4] *See Kimberlin v. Quinlan*, 774 F. Supp. 1 (D.D.C. 1991), *rev'd*, *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *reh'g denied and reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated*, *Kimberlin v. Quinlan*, 515 U.S. 1129 (1995). The primary focus of the earlier appellate proceedings was qualified immunity in the context of a heightened pleading standard in motive-based *Bivens* cases. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court determined there is no heightened pleading requirement in such cases.

qualified immunity test is "law-of-the-case" that went unchallenged in the first appeal. App. at A-29. The court undertook no analysis of the second part of the immunity analysis—whether Quinlan's and Miller's conduct was objectively reasonable measured against the clearly established law. *Id.* Petitioners filed an interlocutory appeal pursuant to 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

The Court of Appeals panel was unanimous in concluding that the district court failed to analyze whether Quinlan's and Miller's conduct was objectively reasonable. The panel divided, however, as to how this immunity issue should be resolved and as to the appropriate standard to apply.[5] Chief Judge Edwards, writing for himself and Judge Silberman, held the case should be remanded for a determination of whether petitioners' conduct was objectively reasonable *and* held further that immunity is not appropriate if there are disputed issues of fact as to Petitioners' motivation. App. at 11a-12a. The Court did not analyze whether immunity should be granted to Petitioners. Additionally, the panel majority went out of its way to state that resolution by the district court would not be subject to future interlocutory appellate review. App. at 12a-13a.

Judge Henderson dissented, arguing Kimberlin's First Amendment rights were not violated and he has not advanced any affirmative evidence of improper motive. Moreover, she stated that because "the district court did not identify what the evidence reveals the [Petitioners] did, it is th[e appellate]

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[5] This Court has held that the qualified immunity analysis requires an examination of whether the law was clearly established and, if so, whether the conduct alleged was objectively reasonable. *Wilson v. Layne*, 526 U.S. 603, 614 (1999). The Court of Appeals panel agreed in this case that the relevant law was clearly established in 1988, although Judge Henderson dissented from the majority's analysis. That determination is not at issue here.

court's 'task'" to review the record "without remand" and resolve the immunity issue in favor of Quinlan and Miller. App. at 19a-20a. In subsequently dissenting from the denial of rehearing *en banc*, Judge Henderson further stated that the record "does not establish a constitutional violation" and that, in remanding, the appellate court permits Kimberlin "to resume his quest for evidence of an imagined wrong . . . [thereby] wast[ing] the time and resources of all involved." App. at 24a.[6]

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *CRAWFORD-EL v. BRITTON.*

The Court of Appeals incorrectly stated and applied a test in this case that imposes an unwarranted burden on Petitioners. This Court should grant the writ to ensure a correct statement and application of the qualified immunity standard in cases such as this where unconstitutional motive is alleged. The issue is of extraordinary importance to the thousands of public officials constantly at risk of being held personally liable for their official actions.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court explained that public officials are entitled to immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Court subsequently explained that,

> what this means in practice is that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action generally turns on

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[6] The Department of Justice's Office of Inspector General separately conducted an extensive investigation of Kimberlin's allegations and concluded, *inter alia*, that Quinlan's and Miller's actions were not based on an improper motive.

> the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken."

Wilson v. Layne, 526 U.S. at 614, citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) and *Harlow*, 457 U.S. at 819. Thus, if there is no issue as to whether the applicable law is clearly established, the public official can still obtain qualified immunity if he or she can demonstrate that the conduct at issue was "objectively reasonable" measured against the clearly established law. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court declined to adopt a heightened pleading standard for motive-based *Bivens* cases, but nonetheless made it clear that qualified immunity is available in cases where improper motive is alleged. 523 U.S. at 593. As the Court explained, when an official asserting qualified immunity,

> has made a properly supported motion, the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify *affirmative evidence* from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive.

523 U.S. at 600 (footnote omitted)(emphasis supplied), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Thus, as Judge Henderson correctly concluded in this case, Quinlan and Miller are entitled to qualified immunity because they submitted a well-supported summary judgment motion demonstrating objectively reasonable conduct, even viewed in a light most favorable to Kimberlin. App. at 20a; *See Siegert v. Gilley*, 500 U.S. 226 (1991). Kimberlin has not advanced any affirmative admissible evidence of improper motive by Quinlan or Miller. *Id.;* App. at 24a.

The Court of Appeals panel majority agreed that Quinlan and Miller are not precluded from obtaining summary

judgment merely because Kimberlin *alleges* improper motive. App. at 11a. The majority erred, however, in implicitly asserting that even if Quinlan and Miller demonstrate an objectively reasonable basis for their actions, they cannot obtain immunity unless they prove there is no dispute about their motive, App. at 12a, even though this Court has made clear that motive is "irrelevant on the issue of qualified immunity." *Crawford-El*, 523 U.S. at 588-89. This additional hurdle imposed on Quinlan and Miller by the Court of Appeals has no support and serves to undermine "the substance of the qualified immunity defense." *Id.*. at 598. Indeed, it severely diminishes the availability of qualified immunity in motive-based cases, a result this Court did not intend. If the evidence of motive offered by Petitioners is "objectively reasonable" qualified immunity must be accorded to Petitioners *unless* Kimberlin can advance "affirmative evidence" to carry "his [] burden of proving the pertinent evidence." *Id.* at 600.

The only basis cited by the Court of Appeals for imposing an additional burden on Petitioners is its assertion that this Court, in *Crawford-El*, "specifically rejected [Judge Henderson's] proposal to immunize all officials whose conduct is 'objectively valid' regardless of improper intent.' " App. at 12a. However, neither Judge Henderson nor Petitioners advanced that argument. Rather, Quinlan and Miller submitted objectively reasonable bases for their actions, to which Kimberlin did not respond with any "affirmative evidence" demonstrating improper motive, *even viewing the record in a light favorable to him. See* App. at 19a-20a. Under *Crawford-El*, that is, and should be, sufficient to warrant a grant of qualified immunity to Petitioners.[7]

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[7] There is conflict in the courts of appeals about how to apply *Crawford-El* in motive-based Bivens cases. *Compare Dudley v. Angel*, 209 F.3d 460, 463 (5th Cir. 2000) (immunity granted) and *McCullough*

The panel majority erred in holding that in spite of Petitioners' unrebutted objectively reasonable conduct, Kimberlin can still defeat their immunity argument if only he can create a "disputed issue of fact." App. at 12a. It is imperative that this Court correct this error. In *Crawford-El*, Justice Stevens decried placing a thumb on the defendants' side of the scale in immunity cases. 523 U.S. at 593. Taking that admonition too far, the Court of Appeals has unfairly placed its thumb on the plaintiff's side of the scale here.

II. THE COURT OF APPEALS ERRED IN NOT ATTEMPTING TO RESOLVE IMMUNITY NOW.

The Court of Appeals also erred in remanding this case to district court for still more proceedings, rather than, as Judge Henderson urged, resolving it now in favor of Petitioners, consistent with this Court's cases. In *Behrens v. Pelletier*, 516 U.S. at 313, this Court was faced with a claim to immunity, raised in a summary judgment motion, in a case where both the district and appellate courts had denied qualified immunity but failed to explain their factual bases for doing so. Justice Scalia, writing for the Court, cited *Johnson v. Jones*, 515 U.S. 304, 319 (1995), for the proposition that,

> under such circumstances 'a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party likely assumed.'

Thus, Judge Henderson was correct. Here Quinlan and Miller asserted qualified immunity in district court and that court denied the motion without examining any of the record in support thereof, thereby "at least implicitly resolv[ing the issue] in Kimberlin's favor." Under these circumstances the

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v. Wyandanch Union Free School Dist., 187 F.3d 272, 280 (2d Cir. 1999) (same) with *Hoard v. Sizemore*, 198 F.3d 203, 217-20 (6th Cir. 1999) (denial of qualified immunity).

Court of Appeals was obliged to review the record and make the immunity determination itself. App. at 18a-19a.

That approach fully conforms with other, well-established principles of qualified immunity law. First, a resolution by the appellate court, rather than remand, advances the well-established principle—repeatedly stressed by this Court—that qualified immunity motions should be decided promptly "at the earliest possible stage in litigation." *See e.g. Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Mitchell v. Forsyth*, 472 U.S. at 526. Second, this Court has made clear that "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Crawford-El*, 523 U.S. at 600. As Judge Henderson correctly observed, because the district court denied immunity in the face of an uncontroverted record establishing that Quinlan and Miller acted reasonably, and with no ill motive, the Court of Appeals should have resolved immunity and in Petitioners' favor.[8] Third, resolving immunity now helps to defray the "substantial social costs" accompanying every case that subjects public officials to possible personal liability. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

III. THE COURT OF APPEALS ERRED IN PRECLUDING IN ADVANCE ANY FUTURE INTERLOCUTORY APPEAL THEREBY "ASSURING COMPLIANCE BELOW WHILE AVOIDING ACCOUNTABILITY ABOVE"

Finally, the Court of Appeals erred in going out of its way, unnecessarily and in unwarranted dicta, to opine that

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[8] In Miller's case the Court of Appeals' resolution is all the more harmful because the record contains no admissible evidence that he had any role at all with respect to Kimberlin. Indeed, Quinlan made the point in discovery that he, and he alone, made each of the decisions at issue. The panel majority utterly failed to address this point and thus the mystery of why Miller is even a defendant in this case continues. The promise of an early exit in meritless *Bivens* cases has been an empty promise for him.

Petitioners cannot appeal on an interlocutory basis any future denial of their qualified immunity by the district court. This determination is based solely on the panel majority's reliance on *Johnson v. Jones*, coupled with its prognostication that if the district court denies qualified immunity on remand it will do so in a way that precludes further appeal. App. at 12a-14a. It may well be that the district court will act in such a manner. However, the court might also deny qualified immunity through some misapplication of the law. In that case, this Court has made it clear that further interlocutory appeal is available. *Behrens v. Pelletier*, 516 U.S. at 312-13. It was unfair and unwarranted for the Court of Appeals to opine in advance that no future appeal will be permitted. The Court's action "ha[s] the effect, if not the purpose, of assuring compliance below while avoiding accountability above." *See* Scalia, A., *Vermont Yankee: The APA, The D.C. Circuit And The Supreme Court*, 9 Sup. Ct. Rev. 345, 372 (1978).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MICHAEL L. MARTINEZ
Counsel of Record
PAUL G. LANE
THOMPSON HINE & FLORY LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800
Counsel for Petitioners

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